July 7, 1998

MEMORANDUM FOR: Marcia D. Finn
District Director, OWCP

FROM: **DAVID W. DI NARDI**
Administrative Law Judge

SUBJECT: Raymond Doucette v. General Dynamics Corporation and Director, OWCP
98-LHC-247/248
1-133164/115601

Pursuant to Section 702.349 of the Rules and Regulations governing the Longshore and Harbor Workers' Compensation Act, I am transmitting herewith my signed **Decision and Order Awarding Benefits**. It is our understanding that service of this **Decision and Order Awarding Benefits** is undertaken by your office.

As per our agreement, we will keep possession of the legal file in this case for four weeks, then forward it to you.

Attachment

DWD:ln

In the Matter of:		
Raymond Doucette Claimant		Case Nos.: 98-LHC-247/248 OWCP Nos.: 01-133164/115601
v.		
General Dynamics Corporation Employer/Self-Insurer		
and		
Director, Office of Workers' Compensation Programs U.S. Department of Labor Party-in-Interest		

Appearances:

Thomas Albin, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 15, 1998 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, RX for an Employer's exhibit, and JX for a joint exhibit. The record was closed on July 2, 1998, with the filing of the official transcript.

This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate (TR 6-7), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On May 10, 1990 and February 24, 1995, Claimant suffered injuries in the course and scope of his employment.

4. Claimant gave the Employer notice of the injuries in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on October 8, 1997.

7. The applicable average weekly wage is $821.95 for the 1990 injury, and $684.76 for the 1995 injury.

8. The Employer voluntarily and without an award has paid temporary total compensation from March 4, 1995 through October 27, 1996, and permanent partial disability benefits from October 28, 1996 to the present.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant’s disability.

2. The date of Claimant’s maximum medical improvement.

3. The availability of Section 8(f) relief.

Summary of The Evidence

Raymond Doucette (Claimant), is a fifty-eight (58) year old man, with a tenth grade education. (TR 20) In 1976, Claimant began working as an outside electrician at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation (Employer), a maritime facility adjacent to the navigable waters of the Thames River where the

Employer builds, repairs and overhauls submarines. (TR 30) Claimant's duties involved providing electrical services on the boats prior to the time the boats received their permanent power supply. (TR 21-22)

Claimant began experiencing knee problems in the 1950s. (TR 28-29) In 1959 Claimant underwent surgery on his left knee, performed by Dr. Broulet. Claimant testified that following the surgery it took seven years for him to be able to bend that knee. (TR 29) In 1959, the United States Army rejected Claimant's application due to his leg problems. Claimant testified that he told Employer about his legs in 1976 when they hired him. (TR 30)

On April 18, 1980, Claimant twisted and injured his left leg when it became caught between two angle irons. (TR 30; RX 12; RX 17) On April 22, 1980, Claimant was examined by Donald F. Sprafke, M.D., who diagnosed internal derangement of the left knee, and temporarily removed Claimant from work at Employer's facility. (RX 12)

On July 10, 1984, Claimant twisted his left knee when climbing onto a boat and moving an eight foot hose. (RX 5) Claimant was again examined by Dr. Sprafke who diagnosed internal derangement of the left knee. (RX 12) In a report dated June 18, 1985, Dr. Sprafke noted that Claimant had a fifteen (15) percent permanent partial disability of the left knee. On July 31, 1984, Dr. Sprafke performed knee surgery, and provided a postoperative diagnosis of "torn left medial meniscus and osteochondral lesion, left femoral condyle." (JX 3 at 3)

On January 1, 1986, Claimant was pulling a cable when he hit his left elbow, injuring it. (RX 6) On January 20, 1987, Claimant was examined by Daniel E. Moalli, M.D., who concluded that Claimant's "major problems are from ulnar nerve compression at the elbow." (RX 16 at 1) On February 23, 1987, David C. Cavicke, M.D., performed a left ulna nerve entrapment at Claimant's elbow. (JX 3 at 1)

On January 13, 1987, Claimant felt a sharp pain to his right knee while walking into a boat. (RX 7; RX 15 at 1) Claimant was examined by Dr. Sprafke who diagnosed internal derangement of the right knee. (RX 12) On January 29, 1987, Dr. Sprafke diagnosed a torn medial meniscus and performed arthroscopic surgery on Claimant's right knee. (RX 12) Claimant was also examined by Paul Gerity, M.D., who diagnosed phlebitis of the right leg. (RX 15 at 1)

On January 28, 1987, James Derby, M.D. diagnosed Claimant with internal derangement right knee with probable tear medial meniscus,

and on January 29, 1987, he performed arthroscopy and partial medical meniscectomy on Claimant's right knee. (JX 3 at 5)

Claimant was next hospitalized in April of 1987, and treated by Neil Palker, M.D., for acute right leg thrombophlebitis. (JX 3 at 6-9)

Subsequently, on October 14, 1987, Dr. Sprafke rated Claimant's right leg disability at ten (10) percent (RX 12), however, in a letter dated February 1, 1998, Dr. Sprafke reviewed his prior treatment of Claimant, and then concluded that Claimant had a permanent partial disability of the right knee of twenty (20) percent. (RX 12)[1] In that same letter Dr. Sprafke noted that following the January 29, 1987 surgery, Claimant "had an extremely difficult . . . course and developed phlebitis and was hospitalized for the phlebitis." (RX 12)

On December 2, 1997, Dr. Cavicke, M.D., examined Claimant regarding his elbow injury and concluded that he suffered from a ten (10) percent partial permanent disability of the elbow, associated with the necessary transposition of the ulnar nerve. (RX 16 at 4) Further, Dr. Cavicke noted, "The difficulty seemed to start when he injured himself in the 1960's and has been aggravated by his work as an electrician since that time." (RX 16 at 4)

On July 21, 1988, Claimant was examined by William R. Cambridge, M.D., who reviewed Claimant's medical record, and performed a physical examination. (JX 1 at 1) Dr. Cambridge noted that Claimant "carries a rather extended history of knee problems" including several prior surgeries. (JX 1 at 1) Dr. Cambridge then recommended that Claimant be placed on partial restrictions, including limited squatting, kneeling and crawling. Dr. Cambridge then opined that "[b]ased on the patient's descriptions of his symptoms and my physical examination, a 20% permanent partial disability is not unreasonable." (JX 1 at 2)

On May 10, 1990, Claimant injured his right knee at work when he was climbing, and his right knee "gave out." (RX 2)[2] Dr. Cambridge, following an examination on October 9, 1990, recommended

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[1] In a letter dated April 27, 1998, Dr. Sprafke explained that he raised his rating from ten to twenty percent "because of the post operative meniscectomy with the chrondral lesion of the femoral condyle and also the chronic phlebitis in the leg which is secondary to the surgery." (RX 12)

[2] This injury provides the basis for Claimant's first claim in this matter.

and performed right knee surgery on October 11, 1990. (JX 2 at 1) Following the surgery, Dr. Cambridge kept Claimant off work until mid-December 1990, and he continued to treat Claimant periodically for his leg pain and discomfort. (JX 1)

In a report dated May 3, 1991, Dr. Cambridge summarized his treatment of Claimant as follows:

> I had [Claimant] disabled from October 11, 1990 to February 6, 1991. He underwent arthroscopic surgery of his right knee on October 11, 1990. His post operative diagnosis including hypertrophic plica and posterior horn tear of the medial meniscus. . . . [Claimant] tried to return to work on February 6, 1991 but was unable to do so because of swelling in the posterior aspect of his knee. He was taken out of work and an ultrasound was performed which demonstrated a baker's cyst. He continued to complain and finally an MRI was ordered. Of interest is that the MRI did not reveal a baker's cyst but it did reveal degenerative disease involving the medial meniscus and more importantly, the derangement of both the anterior and posterior cruciate ligaments. The patient had an infrapatella synovitis probably secondary to the arthroscopy.
>
> We continued [Claimant's] disability until March 29, 1991. We discussed the findings of the MRI with him. It is obvious that he will have some chronic problems with his knee but we have returned him to work without restrictions.

(JX 1 at 13) Later, on November 8, 1991, Dr. Cambridge rated Claimant's right knee disability at thirty (30) percent. (JX 1 at 14)

Claimant continued to work, and testified that he had trouble crawling through tunnels and climbing and kneeling. (TR 32) Claimant stated that there was no light-duty work, and that he avoided walking up and down the hill at Employer's facility. (TR 34-35) Claimant, however, was not provided a van pass. (TR 35)

In October of 1994 Claimant injured his knee again and was examined by Dr. Cambridge who concluded that Claimant had "propagated another degenerative tear in the meniscus related to the work injury." (JX 1 at 16) On October 31, 1994, Dr. Cambridge performed right knee surgery. (JX 2 at 3)

On February 24, 1995, Claimant was rolling cables at

Employer's facility when his left knee "gave out" and collapsed.[3] He did not go to the Yard hospital, but just tried to work with it. (RX 8) Claimant was unable to work, however, and February 24, 1995 was his last date of work for Employer. (TR 23) Subsequently, in October of 1995, Claimant accepted the "golden handshake" for Employer. (TR 27)

Following the February injury, Claimant was examined by Dr. Cambridge one week later, who then performed arthroscopic surgery on the left knee on March 16, 1995. (JX 2 at 4) Dr. Cambridge removed torn cartilage, found severe arthritis with "bone on bone" and recommended total knee replacement.

Following this date Claimant continued to undergo several surgeries and treatment. On August 21, 1995, Dr. Cambridge performed bilateral total knee replacement surgery. (JX 2 at 11) Following the surgery, Claimant stated that his right knee had improved considerably, but he still was experiencing pain, difficulties and clicking with his left knee. In February of 1996, Dr. Cambridge performed arthroscopic surgery on the left knee, removing some scar tissue and a bone clip. Next, on May 20, 1996, Dr. Cambridge performed arthroscopic surgery on Claimant's right knee, removing the remaining scar tissue. (JX 2 at 14)

Around this same time, on June 13, 1995, Claimant was examined by Peter R. Barnett, M.D. (RX 10) Dr. Barnett reviewed Claimant's medical history and files, and performed a physical examination. Dr. Barnett diagnosed: "1) Moderate degenerative arthritis of the medial compartment of the left leg. 2) Extensive degenerative meniscal tear medially, left knee. 3) Status post arthroscopy of the left knee, partial medial meniscectomy and debridement medial compartment, left knee, 3/16/95." (RX 10) Dr. Barnett further noted, "The patient's degenerative condition in the left knee clearly existed prior to the work related event on 3/24/95." He elaborated: "Certainly the patient's significant pre-existing problems with the left knee would make any potential disability, stemming from the work related injury on 3/24/95, materially and substantially greater than had the pre-existing condition not been present." (RX 10)

On October 28, 1996, Claimant was examined by Philo F. Willetts, Jr., M.D. (RX 8) Dr. Willetts reported Claimant's medical and occupational history, performed a physical examination, interpreted radiological findings, and reviewed Claimant's medical records. Dr. Willetts then diagnosed: "1. Status post total knee replacement, both knees, for chronic degenerative arthritis, 2.

[3] This is the second injury upon which this claim is based.

Status post deep venous thrombosis – on Coumadin. 3. Status post repeat transposition right ulnar nerve – unrelated." Dr. Willetts also noted "strong evidence" of "long preexisting knee problems." (RX 8) Dr. Willetts concluded that Claimant was unable to return to work as an electrician "unless he is given shop electrical assembly work." (RX 8) Dr. Willetts then rated Claimant at fifty (50) percent permanent partial physical impairment of the left, lower extremity, of which forty (40) percent he apportioned to a disability pre-existing the February 24, 1995 injury. Further, he rated a thirty-seven (37) percent permanent partial physical impairment of the right lower extremity, of which thirty-two (32) percent pre-existed the February 24, 1995 injury. (RX 8) Dr. Willetts, in a deposition, reiterated that the February 24, 1995 injury was not the sole cause of Claimant's disability and that Claimant's pre-existing conditions combined to make his present disability materially and substantially greater. (RX 9 at 12)

Currently, Claimant is still experiencing pain, discomfort, and instability in his knees. Claimant continues to be treated by Dr. Cambridge, and Claimant receives partial Social Security Administration benefits because of his disability. (TR 26)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976),

cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** Te presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS

284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral knee injuries, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S. Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an

injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

The closed record conclusively establishes that Claimant's bilateral knee injuries on both May 10, 1990 and February 24, 1995, have directly resulted his work at the Employer's shipyard, that Claimant timely advised the Employer of his work-related injuries, that Employer authorized appropriate medical care and treatment and has paid certain compensation benefits to Claimant while he was unable to return to work and that Claimant timely filed for benefits once a dispute arose between the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc.**

v. Salzano, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work at Employer's facility as an outside electrician. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternative employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams**

v. General Dynamics Corp., 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on October 28, 1996, and that he has been permanently and totally disabled since that date, according to the well-reasoned report of Dr. Willetts, dated the same day. (RX 8)

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injuries. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979); Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Adams v. Newport News Shipbuilding, 22 BRBS 78 (1989); Smith v. Ingalls Shipbuilding, 22 BRBS 26, 50 (1989); Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988); Perry v. Carolina Shipping, 20 BRBS 90 (1987); Hoey v. General Dynamics Corp., 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, 16 BRBS 267, 270 (1984), modified on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to Claimant while he has been unable to return to work. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent

injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from

medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects: (1) that Claimant has worked for Employer since 1976 (TR 30); (2) that Claimant suffered a knee injury in the late 1950s, which required surgery in 1959 (TR 29); (3) that Claimant was rejected by the United States Army in 1959 due to his knee problems (TR 11); (4) that Claimant has suffered numerous bilateral knee injuries while working at Employer’s facility, beginning in the 1980s; (5) that Claimant suffered a left knee injury on July 10, 1984 (RX 4); (6) that Claimant suffered an elbow injury on January 1, 1986 (RX 6), resulting in a ten (10) percent permanent partial disability (RX 16 at 4); (7) that Claimant suffered a right knee injury on January 13, 1987 (RX 7); (8) that Claimant suffered a right knee injury on May 10, 1990 (RX 4; RX 2); (9) that Claimant suffered a left knee injury on February 24, 1995 (RX 1); (10) that Claimant has undergone numerous surgeries on his knees (JX 2; JX 3), including bilateral total knee replacement surgery on August 21, 1995 (JX 2 at 11); (11) that Claimant’s left

lower extremity disability was rated at fifty (50) percent, forty (40) percent of which was attributed to a pre-existing condition according to the well-reasoned opinion of Dr. Willetts (RX 8); (12) that Claimant's right lower extremity disability was rated at thirty-seven (37) percent, thirty-two (32) percent of which was attributed to a pre-existing condition according to the well-reasoned opinion of Dr. Willetts (RX 8); (13) that the Employer hired and retained Claimant as a valued employee even with knowledge of his multiple medical problems, (14) that the Employer has accepted Claimant's return to work after this several surgeries; (15) and, finally, that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the aforementioned medical problems) and his May 10, 1990 and February 24, 1995 injuries as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, and that the May 10, 1990 and February 24, 1995 injuries are not the sole cause of Claimant's current disability, according to the well-reasoned report and deposition of Dr. Willetts, (RX 8; RX 9 at 11-14), in addition to the report of Dr. Barnett. (RX 10); **see also Luccitelli v. General Dynamics**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his May 10, 1990 and February 24, 1995 injuries, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C&P Telephone Co. v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industr.**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney Fee

Claimant's attorney, having successfully prosecuted this claim by obtaining additional benefits as a result of a successful appeal to the Board, is entitled to a fee to be assessed against Employer. Claimant's attorney has already submitted his fee application (CX 2), and he has sent a copy thereof to the Employer's counsel who shall then have fourteen (14) days from receipt of said fee application to comment thereon. This Court will consider only those legal services rendered and costs incurred after October 8, 1997, the date of the informal conferences. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer, General Dynamics Corporation, as a self-insurer, shall pay to the Claimant compensation for his temporary total disability from February 24, 1995 through October 27, 1996, based upon an average weekly wage of $684.76, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on October 28, 1996, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $684.76, such compensation to be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his repetitive trauma, right shoulder injuries on and after February 24, 1995.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related

injuries referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

6. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

7. Claimant's attorney has already filed his fee petition and Employer's counsel shall have fourteen (14) days to comment thereon after the receipt thereof. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on October 8, 1997. The fee petition will be considered in a supplemental decision.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:pte